ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CA07-846

MARCH 12, 2008

CATHY JANELL WOODWARD APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. E-98-482-6]
V.	HON. MARK LINDSAY, JUDGE
ANDREW DEWAYNE WOODWARD APPELLEE	AFFIRMED

Appellant Cathy Woodward files this one-brief appeal from the Washington County Circuit Court's decision to change custody of the parties' two minor children to her ex-husband, appellee Andy Woodward. On appeal, she argues that the circuit court erred by finding that appellee had proven a material change in circumstances by a preponderance of the evidence and that the children's best interests would be served by changing custody to appellee. We affirm.

The parties were married on November 18, 1994, and divorced on April 27, 1998. Two children, a daughter, D/O/B: May 29, 1995, and a son, D/O/B: September 27, 1996, were born of the marriage. At the time of the divorce, appellant was awarded custody of the

minor children by agreement of the parties. On August 27, 2002, the parties entered into a consent order that modified the original visitation schedule to accommodate the parties' work schedules and to allow appellee more time with the children. Subsequently, on November 28, 2006, appellee filed a petition seeking to modify custody, visitation, and support and a motion to show cause seeking custody of the parties' children and a restraining order to keep the children away from appellant's on-again/off-again boyfriend, Mark Rheam. The petition alleged that appellant was unfit to have custody of the children because: (1) she cohabited with Rheam on three occasions since the divorce without the benefit of marriage in the custodial home; (2) Rheam's presence adversely affected the welfare of the children because Rheam used and abused alcohol in the presence of the children; (3) Rheam endangered the children by driving a vehicle while under the influence of alcohol with the children in the vehicle; (4) Rheam had been physically abusive to the children and beat them regularly with a belt and other objects, including willow branches; (5) Rheam threatened the children, causing them to be afraid to return to the custodial home; (6) Rheam and appellant continually fought in the presence of the children, using inappropriate language in their presence; (7) appellant was present and aware of all of the above-described behavior on behalf of Rheam.

A brief hearing was held on November 29, 2006, after which the circuit court entered an order of temporary custody in favor of appellee on December 7, 2006, which also ordered appellant to allow absolutely no contact between Rheam and the children. On March 29, 2007, a full hearing on the merits of the petition was held, and both parties presented

evidence. An order was entered on April 23, 2007, granting custody of the children to appellee. Appellant filed a timely notice of appeal on May 22, 2007.

The court of appeals reviews child custody cases de novo, but does not reverse absent a finding that the circuit court's findings were clearly contrary to the preponderance of the evidence. *Carver v. May*, 81 Ark. App. 292, 101 S.W.3d 256 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* Especially in child-custody cases, the circuit court receives exceptional deference because of its superior position to evaluate and judge the credibility of the witnesses. *Id.* It is well settled that the primary concern in child-custody cases is the child's welfare and best interest; all other considerations are merely secondary. *Id.*; *Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000). Before a custody order can be changed, the court must be presented with proof of material facts which were unknown to the court at the time of the initial custody order or proof that conditions have so materially changed as to warrant a custody modification and that the best interest of the child requires it. *Carver*, *supra*.

Determining whether there has been a change of circumstances that materially affects the children's best interest requires a full consideration of the circumstances that existed when the last custody order was entered in comparison to the circumstances at the time the change of custody is considered. *Blair v. Blair*, 95 Ark. App. 242, 235 S.W.3d 916 (2006). Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388

(2002). Neither will custody be changed to punish or reward either parent. *See Hobbs v. Hobbs*, 75 Ark. App. 186, 55 S.W.3d 331 (2001). Moreover, our courts refuse to modify custody merely because one parent has more resources or income. *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003). That said, as between parents, a showing of unfitness is not necessary in order to warrant a change of custody. *Vo*, *supra*.

After the non-custodial parent has demonstrated a material change in circumstances, the court, rather than requiring the non-custodial parent to show an adverse impact on the child from the material change in circumstances, should weigh the material changes and consider the best interest of the child. *See Vo*, *supra*. There are several factors to consider when determining the best interest of the child, including the psychological relationship between the parent and the child, the need for stability and continuity in the child's relationship with the parents and siblings, the past conduct of the parents toward the child, and the reasonable preference of a child. *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997). The best interest of the child trumps all other considerations. *Durham v. Durham*, 82 Ark. App. 562, 120 S.W.3d 129 (2003).

The circuit court's findings in this regard will not be reversed unless they are clearly erroneous. *See Vo*, *supra*. While custody is always modifiable, appellate courts require a more rigid standard for custody modification than for initial custody determinations in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues. *Id*. There are no cases in which the superior position, ability, and opportunity of the circuit judge to observe the parties carries a greater weight than those involving the

custody of minor children, and our deference to the circuit judge in matters of credibility is correspondingly greater in such cases. *Id.*

I. Material Change of Circumstances

In this case, the circuit judge focused on the age of the two children, specifically that they are older now and are involved in activities after school that require transportation, combined with changes in the parties' work schedules, as the primary change in circumstances. He also pointed out that "the big issue in this case" was appellant's association with Rheam. While the circuit judge acknowledged that appellant had been associated with Rheam in one way or another for some twenty years or more, he did not specifically discuss the relationship, or association, as it has affected everyone involved since the time of the divorce as it related to the material change in circumstances.

Appellant argues that nothing of great moment has occurred regarding the parties and their children since the divorce in 1998. Both children have been and remain healthy. A specific acknowledgment was made regarding how well both children continue to do in school. The circuit court found that there was no argument or cause for concern over the physical environment with respect to either parent's residence. The circuit court went further to specifically say that the evidence was insufficient to support appellee's allegations of physical abuse by Rheam and stated that the only abuse was in a moral sense insofar as both parties had cohabited with members of the opposite sex without the benefit of marriage at various times since the divorce. The only distinction drawn was that appellee married one of the women

with whom he cohabited, and there was no evidence of criminal or other undesirable behavior on her part that might detrimentally affect the children.

Appellant points out that the circuit judge referred to Rheam as a "bad seed" and stated that appellant was addicted to him. He pointed out that she continued to do "favors" for Rheam each time he asked her to, that Rheam was likely to ask again in the future, and that he was concerned appellant would accommodate Rheam even to the detriment of her children. Appellant makes a point that appellee failed to take any significant action regarding her relationship with Rheam over the years, and that each time he requested that she remove him from the residence, she complied.

This court, in *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999), a case involving a change of custody, affirmed a circuit court's finding of changed circumstances, holding "that the [circuit judge's] finding that there had been a material change in circumstances is not clearly against the preponderance of the evidence because when the events are considered together–the move, the remarriage, the strained relationships, and the clearly defined preference of the children–they constitute a change in circumstances." *Id.* at 115, 986 S.W.2d at 108. The *Hollinger* court found that "the combined, cumulative effect of these particular facts constitutes a material change in circumstances." *Id.* at 116, 986 S.W.2d at 108. The same analysis can be applied in the instant case. Factoring in the increased age of the children and their resulting activity schedules plus the need for parental involvement, the change in the parties' work schedules and resulting availability or lack thereof, combined with appellant's repeated association and cohabitation since the last order, we cannot say that

the circuit court's findings with respect to a material change in circumstances was clearly contrary to the preponderance of the evidence.

II. Best Interest of the Children

Appellant argues that the circuit court erred in finding that it was in the best interest of the parties' children for appellee to be awarded custody. She contends that the circuit court should not have focused on Rheam's prior criminal convictions, which include: three D.W.I.'s; a suspended driver's license; two domestic-battery convictions, one of which indicates that appellant was the victim; a terroristic-threatening charge; as well as convictions for driving on a suspended license, failure to appear and pay fines and costs, driving with no insurance, violation of the open container law, and speeding. She asserts that appellee admitted during the hearing that these offenses were not the result of acts that occurred in the presence of the minor children and that none of the offenses that resulted in the convictions in any way endangered the children. She further points out that these convictions were not the basis of appellee's original petition, and that he was not aware of them until his attorney conducted a background check on Rheam.

Appellant testified that she has not had "relations" with Rheam since well before the petition was ever filed, that she does not know where he currently is, and would not have continued to do favors for him, including letting him stay at her home, had she realized that, on *this particular occasion*, appellee would pursue a change of custody. She emphasizes that the circuit court specifically stated that appellee had failed to meet his higher burden of proof with respect to the physical abuse and threatening allegations and points out that physical

surroundings and hygiene were not major problems. She claims that the circuit court's reasoning with regard to her potential future conduct with respect to Rheam was speculative, and that his decision was not based upon proof before the court. Instead of admonishing her, which she claims would have been the appropriate action in a case of this nature, appellant argues that the circuit judge erroneously changed custody. She contends that she is now fully aware that Rheam cannot be, and will not be, in the presence of her children at any time in the future. She claims that she is committed to following any continued admonition that the court might issue regarding Rheam's contact with her children, and points out that no evidence of the admonition issued at the temporary hearing was cited at the hearing on the merits.

The circuit court utilized the appropriate factors in indicating how and why he made his ruling in this case. As to the best interests of the children, appellee's schedule and availability was discussed in detail, as was the structure and organization with respect to hygiene, homework, meals, and activities. While acknowledging appellee had also cohabited with his current wife before marriage, the circuit court indicated that there was no indication that she was a bad influence or had a detrimental effect on the children. The circuit court expressed that while the children might not have been present at the time of Rheam's arrests on past occasions, that fact does not necessarily indicate that they were not ever endangered by his actions. In particular, appellant admitted, and the children corroborated, that on at least two occasions, Rheam drove a vehicle, in which the children were passengers, while drinking alcohol. That is not mere speculation on the part of the circuit court; it already occurred with

appellant's knowledge and consent. The circuit court emphasized the following in his ruling from the bench:

> Number one, it may be true that these particular offenses for which [Rheam] was charged did not endanger the children, but the number of charges that he has had indicate to me that number one, he has got a serious problem with alcohol, and number two, he has a serious problem with obeying the law in general. He drives after his driver's license has been suspended. He fails to appear for court. He fails to pay his fines and costs. He is twice convicted of domestic battery. And so I don't follow the logic. And he drinks and drives. I do not follow the logic that just because the children weren't there on these particular dates that that means he's been a little angel the rest of the time. In fact, I think this proof is an indication and circumstantial evidence of the fact that this guy's a bad seed. He is not someone you want children of this age around based upon those charges. And [appellant] admitted that from the witness stand.

The circuit court also referred to appellant's admission that she and Rheam argued frequently and used bad language around the children. The circuit court expressed concern that appellant was not worried about the irritation that Rheam brought upon the children, including the licking eyeball "game" in order to wake them up in the morning, aggressively playing video games against her son, and smoking in her son's bedroom.

The reference to appellant being "addicted" to Rheam appears to be accurate based upon the evidence presented. Appellant has failed to show that she has, or will, place the needs of the children above her own desires where Rheam is concerned. The circuit court did not find her to be credible about either the status of their relationship or her knowledge of Rheam's whereabouts at the time of the hearing. She admitted to the circuit court that she would likely help Rheam if he asked for her help again. All of this, when viewed together,

is sufficient to meet the primary consideration regarding the welfare and best interests of the children involved. *See Dansby v. Dansby*, 87 Ark. App. 156, 189 S.W.3d 473 (2004).

Although custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the children, and we review the case de novo, we will not reverse a circuit judge's findings in this regard unless they are clearly contrary to the preponderance of the evidence. *Henley v. Medlock*, 97 Ark. App. 45, __ S.W.3d __ (2006). A finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Henley*, *supra*. We are not left with such a conviction in this case; accordingly, we affirm.

Affirmed.

GLOVER and VAUGHT, JJ., agree.